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Reply to Olympia office

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Mr. Jack Zeigler
Policy and Rules Manager
Washington State Department of Enterprise Services
Via email only: rules@des.wa.gov

Re: Rulemaking Objection by Capital Business Machines, Inc.
Our file no. 00458/012

Dear Mr. Zeigler:

I am writing on behalf of my client, Capital Business Machines, Inc., ("CBM") regarding rules proposed by the Department of Enterprise Services ("DES") and filed as WSR 14-16-122, for proposed Chapter 200-380 WAC, Print Management. CBM objects to portions of the new rules and alleges the following errors in DES's rulemaking process.

Incorporation by Reference

The proposed rules are remarkably brief; there are only three sections and the substantive section, WAC 200-380-030, is only 101 words in length. That section reads as follows:

> (1) In managing their printing operations, all agencies shall implement cost and resource savings strategies to improve efficiencies and minimize the cost of printing jobs, including optimization and reduction of both agency-based printing, and those jobs that require services of a private sector print shop or another state agency's print shop.
>
> (2) Agencies shall implement such strategies based on the successes of implementation of existing print management programs in state agencies.
>
> (3) Agencies must implement managed print strategies to track, manage, and reduce agency-based printing, to include implementation of managed print services where applicable, pursuant to RCW 43.19.733 and the department's *Print Management Guidelines*.

This section is essentially a paraphrase of RCW 43.19.742, requiring the establishment of rules and guidelines:

> To improve the efficiency and minimize the costs of agency-based printing, the department *shall establish rules and guidelines for all agencies to use* in managing their printing operations, including both agency-based printing and those jobs that require the services of a print shop, as based on the successes of implementation of existing print management programs in state agencies. At a minimum, *the rules and guidelines must implement* managed print strategies to track, manage, and reduce agency-based printing. [italics added].

The reason for parroting back the statute can be surmised from the final clause of proposed Chapter 200-380 WAC; that is, DES intends to flesh out the details of print management and managed print services with *Print Management Guidelines*. However, to implement this approach and adopt the WAC as written at this time would be erroneous.

The Administrative Procedures Act ("APA") allows for incorporation of certain items by reference as follows:

> An agency may incorporate by reference and without publishing the incorporated matter in full, all or any part of a code, standard, rule, or regulation *that has been adopted* by an agency of the United States, of this state, or of another state, by a political subdivision of this state, or by a generally recognized organization or association if incorporation of the full text in the agency rules would be unduly cumbersome, expensive, or otherwise inexpedient. The reference in agency rules shall fully identify the incorporated matter. An agency may incorporate by reference such matter in its rules only if the agency, organization, or association originally issuing that matter makes copies readily available to the public. The incorporating agency shall have, maintain, and make available for public inspection a copy of the incorporated matter. The rule must state where copies of the incorporated matter are available. [italics added].

If DES adopts proposed WAC 200-380-030, DES will exceed its authority under the APA because the *Print Management Guidelines* have not yet been created and, therefore, DES cannot meet the requirements that 1) the incorporated matter has been adopted, 2) the incorporated matter be readily available to the public, 3) the incorporating agency make copies available to the public, and 4) the rule states where copies are available. Accordingly, the attempt to incorporate non-existent *Print Management Guidelines* is impermissible and, under the circumstances, amounts to an end-run around the rulemaking requirement in RCW 43.19.742.[1]

Compliance with RCW 43.19.742

With no guidelines to adopt by reference, WAC 200-380-010 through 030 do not meet the requirements of RCW 43.19.742. That statute requires that DES adopt rules and guidelines that "implement managed print strategies to track, manage, and reduce agency-based printing." The proposed rules do not implement managed print strategies, but instead direct agencies to implement them. Accordingly, DES will not have fulfilled its duty under RCW 43.19.742 by promulgating Chapter 200-380 WAC.

Further, other agencies lack the authority to adopt rules and guidelines to implement managed print strategies, and DES lacks the power to delegate such authority. The Supreme Court has

[1] Under the principle of *expressio unius est exclusio alterius*, any argument that the right to incorporate non-existent guidelines is implied or inherent is erroneous. The APA sets forth requirements for incorporation by reference and Chapter 43.19 RCW does not relax or supersede those requirements.

held that "an agency created by statute has only those powers expressly granted or necessarily implied from the statute." *Anderson, Leech & Morse, Inc. v. Washington State Liquor Control Bd.*, 89 Wn.2d 688, 694, 575 P.2d 221 (1978); *see, also*, *Ortblad v. State*, 85 Wn.2d 109, 530 P.2d 635 (1975); *King County Water Dist. No. 90 v. City of Renton*, 88 Wn. App. 214, 944 P.2d 1067 (Wn. App. Div. 1, 1997). Further, the Court in *Ortblad v. State* held that "where a person or board is charged by law with a specific duty, and the means for its performance are appointed by law, there is no room for implied powers." 85 Wn.2d 109, 118, 530 P.2d 635 (citing *State ex rel. State Bd. of Medical Examiners v. Clausen*, 84 Wash. 279, 282, 146 P. 630 (1915)).

By proposing Chapter 200-380 WAC, DES has failed to fulfill its duties under RCW 43.19.742. It may not remedy its failure by delegating its duties to other state agencies. By doing so, it would put both DES and those agencies in a precarious legal position.

Substituting Guidelines for Rules

Finally, even if DES remedied the absence of *Print Management Guidelines*, addressed above, many of the matters likely to be addressed by the prospective guidelines would, in fact, constitute rules under the APA and, therefore, need to be subjected to the APA's process for promulgating rules. This makes DES's reliance on the guidelines all the more problematic, because a cure of the lack of guidelines after the fact would likely result in a new violation of the APA.

The Washington Administrative Procedures Act defines "rule" at 35.04.010(16), as follows: "any agency order, directive, or regulation of general applicability[...] (c) which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law."

The guidelines the Department of Enterprise Services is proposing for print management are likely to establish, alter, or revoke any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law and are thus illegal rules and are a violation of the state's Administrative Procedures Act.

> Rules are invalid unless adopted in substantial compliance with the APA. RCW 34.04.025(5). Paramount among the requirements are notice and the opportunity to submit pertinent information (RCW 34.04.025(1)(a), (b)). The existence of—and required adherence to—these requirements is fundamental to the constitutional validity of legislative delegations to administrative agencies.

Ocosta Sch. Dist. No. 172 v. Brouillet, 38 Wn. App. 785, 791 (1984) (citing *Barry & Barry, Inc. v. Department of Motor Vehicles,* 81 Wn.2d 155 (1972)).

The rule in *Ocosta* was a determination by the State Superintendent of Public Instruction that sales proceeds from timber sales on county tax title land would be deducted from State funds allocated to a school district.

In this case, the implementing of print management service in state agencies establishes qualifications or requirements relating to the enjoyment of benefits or privileges conferred by law; *i.e.*, it determines print management contractors' ability to continue competing for agency contracts and the public funds allocated to those contracts. Such competition is a benefit or privilege conferred by law. How managed print services and strategies are implemented among state agencies will impact all printing contractors as a class and, therefore, such matters are rules of general applicability that must be implemented under the APA. *See Failor's Pharmacy v. Dep't of Soc. & Health Servs.*, 125 Wn. 2d 488, 497, 886 P.2d 147, 152 (1994).

Accordingly, additional rules are needed in order to satisfy RCW 43.19.742. Although RCW 43.19.742 refers to rules *and* guidelines, it does not authorize guidelines in place of rules. Adoption of guidelines outside the APA process would not be a lawful substitute for adequate rules.

Conclusion

For the above reasons, DES should rescind the proposed Chapter 200-380 WAC and pursue further rulemaking. Failure to do so would be erroneous and subject to appeal under the APA. A coalition of companies and industry groups is prepared for such an appeal, if necessary.

Thank you.

Yours very truly,

BEAN, GENTRY, WHEELER & PETERNELL, PLLC

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MAP/RDW/pra
cc: Capital Business Machines, Inc.